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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-871

EXXON CORPORATION AND TEXACO INC.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

JOINT PETITION OF EXXON CORPORATION AND TEXACO INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Exxon Corporation (Exxon) and Texaco Inc. (Texaco) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 28, 1973.

OPINION BELOW

The opinion of the Court of Appeals in *Louisiana Power & Light Co.* v. *FPC*, is reported at 483 F.2d 623 (5th Cir. 1973), *reh. denied*, 483 F.2d 1404 (1973). The opinions of the Federal Power Commission (Commission), styled *United Gas Pipe Line Co.*, Docket No. CP71-

89, Opinion Nos. 610 and 610-A, were issued February 9, 1972, and April 7, 1972, and are reported at 47 F.P.C. 245 and 1021, respectively. The opinions and orders of the Court of Appeals and the Commission are reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 28, 1973.[1] A timely petition for rehearing was denied on September 5, 1973, and this petition for writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act (Act), 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether in the course of alleviating local gas supply shortage conditions where supplementary gas is introduced into a local gas transmission system, local regulatory jurisdiction over such system is lost despite Section 1(c) of the Act because the supplementary gas so received comes from an interstate pipeline system owned and operated by the same company.

STATUTE INVOLVED

The statutory provisions which are involved in this proceeding are subsections (b) and (c) of Section 1 of the Act, as amended, 15 U.S.C. § 717(b) and (c). These provisions are reprinted in the Appendix hereto.

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[1] The mandate issued with the judgment of the Court below (App. 27a) applies to Texaco Inc. but not as to Exxon Corporation to which a stay of mandate was granted by the Court on September 25, 1973.

STATEMENT OF THE CASE

United Gas Pipe Line Company (United) operates a natural gas pipeline system in several states along the Gulf Coast. Through this system, United serves numerous customers, including distribution companies, industrial consumers, and other pipeline companies. Although United operates its major pipeline system in interstate commerce subject to regulation by the Commission, it has historically operated various of its systems on an intrastate or local basis. For example, a system in Texas which interconnects with United's interstate system has, within the past few years, been separately incorporated in the name of Pennzoil Pipeline Company and its operations have been declared exempt from Commission regulation under Section 1(c) of the Act. In Louisiana, United has historically operated a pipeline system located in the New Orleans-Baton Rouge area as an entirely separate, intrastate system. This system, which is involved in the litigation here, is known as the Green System-East.

Commencing in about 1966, United began interconnecting its Green System-East with its interstate system. These interconnections were not authorized by the Commission and, as acknowledged by the Commission, constituted violations of the Act.[2] Since the Green System-East operates at a lower pressure than United's interstate pipeline system, no gas can flow from the intrastate to the interstate system and all gas, once entering the Green System-East, is consumed within the State of Louisiana.

By letter issued September 17, 1970, the Commission requested United to submit certificate applications covering uncertificated portions of any of its facilities which might be considered jurisdictional under Section 1(b) of

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[2] App. at 34a, 38a-39a, 62a.

the Act.[3] Pursuant to that letter, United filed an application for a certificate to operate its Green System-East and to make sales for resale from that system which, according to United, became jurisdictional by reason of its unauthorized interconnections between the Green System-East and United's interstate pipeline system. Before determining any issues involved in passing upon United's certificate application, such as adequacy of gas supply and economic feasibility, the Commission first set for hearing the question whether it has jurisdiction over the Green System-East. It concluded that movement of what it termed interstate gas into the Green System-East converted the Green System-East from a non-jurisdictional operation to a jurisdictional pipeline system subject to its plenary jurisdiction. The Commission held that Section 1(c) of the Act (the "Hinshaw Amendment"), which exempts interstate operations from federal regulation where all gas received within a state is consumed within the state of receipt, is not applicable despite the fact that all of the gas received into the Green System-East is actually consumed within the State of Louisiana.

On review the Court of Appeals for the Fifth Circuit affirmed holding, among other things, that United's Green System-East is not exempt under Section 1(c) because (App. at 21a):

> "Congress enacted the 'Hinshaw Amendment' to preserve state control over local distributors who purchase gas from interstate pipelines. Congress did not intend the amendment to relieve the Commission

[3] Section 1(b) provides that sales in interstate commerce for resale and transportation in interstate commerce are subject to the Commission's jurisdiction. Section 7(c) requires that no person shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. App. at 1a, 2a.

of jurisdiction over local branches of integrated interstate systems." (footnote omitted)

The lower court's underlying theory that Section 1(c) is applicable only to local distributors and does not exempt qualified portions of interstate pipelines whose activities are local in nature constitutes its fundamental error.[4]

REASONS FOR GRANTING THE WRIT

This petition presents a case of first impression involving review of the scope of the Commission's jurisdiction as delimited by the exemption contained in Section 1(c) of the Act. As such, it constitutes not only a matter of signal importance in construction of the Act, but also it presents an elemental question of the viability of our federal system of government. Basically, the Court must decide whether Congress intended that federal power should supplement or supplant state jurisdiction in matters of local concern.

Since 1966 United has injected increasing amounts of natural gas into its Green System-East from facilities which also supply gas to United's interstate system serving markets beyond the State of Louisiana. According to the Commission, existence of natural gas in the Green System-East which has travelled part of its journey with other supplies of gas which will subsequently be trans-

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[4] The Fifth Circuit relied strongly upon a statement of Senator Bricker of Ohio in connection with enactment of Section 1(c) where the Senator seems to be saying that no pipeline company would be exempted from Commission jurisdiction. *See* App. 22a. But the Senator's statement is obviously read too broadly by the court, for such an interpretation would mean that the East Ohio Gas Company was not exempt under Section 1(c) when assertion of Commission jurisdiction over East Ohio was the immediate cause for enactment of Section 1(c). In reference to Senator Bricker's statement, it may be noted that exemption of the Green System-East does not remove United Gas Pipe Line Company from Commission jurisdiction.

ported out of state renders all transportation and all sales for resale in the Green System-East subject to its jurisdiction (App. 38a-39a, 50a). The Commission found that the scope of its regulation over United, which had been adequate for many years, including the period since 1966 when United made its first interconnections, suddenly must be expanded to include the Green System-East. It is this expansion of federal power into an area formerly occupied by the state which presents a direct confrontation of state vs. federal interest and requires this Court's in-depth analysis of the purpose of the Section 1(c) exemption.

1. The Fifth Circuit's Decision Expands the Scope of Federal Jurisdiction Contrary to Section 1(c) of the Act.

Section 1(c) was added as an amendment to the Act in 1954 after experience had shown that jurisdiction granted to the Commission by the 1938 Act was too broad.[5] As originally enacted in 1938, the Act was intended to give the Commission authority over those areas of interstate commerce which are beyond the power of the states.[6] Thus, sales in interstate commerce for resale[7] and transportation in interstate commerce[8] were

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[5] See, *e.g.*, "Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 83rd Cong., 1st Sess., on H.R. 2679 and H.R. 3707 Bills to amend the Natural Gas Act of 1938, as amended, and H.R. 3769, H.R. 3892, H.R. 5298, and H.R. 5976, Bills to amend Section 1 of the Natural Gas Act" (June 29, 1953, pp. 5, 8, 18, and 25). *See also*, 100 CONG. REC., Vol. 48, pp. 3042-4043, (daily ed. March 15, 1954). Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364, 368 (D.C. Cir. 1959).

[6] Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 504-05 (1942); Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana, 332 U.S. 507, 514-17 (1949).

[7] *Cf.*, Attleboro Steam & Electric Co. v. Pub. Util. Comm'n of Rhode Island, 273 U.S. 83 (1927).

[8] Pennsylvania Gas Co. v. Pub. Serv. Comm'n, 252 U.S. 23 (1920).

made subject to Commission jurisdiction under Section 1(b). All other sales, including direct sales to consumers and by local distributors, even when interstate commerce was involved, were exempt. *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Comm'n of Indiana*, 332 U.S. 507, 514-17 (1949).

Significantly, as this Court has noted in *Panhandle Eastern*, the "primary purpose [of the 1938 legislation] was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." [9]

However, experience proved that the jurisdictional grant of the 1938 Act was too broad. This Court held in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950), that East Ohio was subject to Commission jurisdiction where it transported and sold gas for consumption wholly within the State of Ohio. East Ohio purchased gas from an affiliate, Hope Natural Gas Company at the Ohio-West Virginia border and clearly acted as the "local branch" of an interstate pipeline system in transporting and selling the gas so received for consumption entirely within the State of Ohio.

Reaction to *East Ohio* found expression in Section 1(c) of the Act.[10] Just as Section 1(b) had recognized that

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[9] 332 U.S. at 517.

[10] Section 1(c), which is popularly called the Hinshaw Amendment, was sponsored by Representative Hinshaw of California. The pipeline companies in California which receive out-of-state supplies conduct their operations entirely within California, and all gas received by them is consumed in California. Those companies have been exempted from Commission jurisdiction by Section 1(c). Physically, their activities cannot be differentiated from those of East Ohio.

certain activities in interstate commerce are nonetheless local in nature—*e.g.*, local distribution and direct sales—Section 1(c) declared that transportation and sales for resale in interstate commerce are local in nature where all of the gas is to be consumed entirely within the state. Thus, in 1954, Congress provided that the Act [Sec. 1(c), 15 U.S.C. § 717(c)]:

> ". . . shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a state if all the gas so received is ultimately consumed within such state or to the facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a state commission."

Thus, the express design of Section 1(c) was to retrieve from the Commission power over certain transactions and facilities in interstate commerce which *East Ohio* had held to be subject to Commission jurisdiction under the 1938 Act. The line between federal and state jurisdiction subsequent to enactment of the Hinshaw Amendment is no less sharp and clear than it was when viewed by the Court in the *Panhandle Eastern* case. In fact, Section 1(c) more clearly defines the aspects of interstate commerce which are local in nature and, thus, subject to regulation of the several states.

But, in affirming the Commission's assertion of jurisdiction over the Green System-East, the Fifth Circuit fails to recognize the line between state and federal jurisdiction. Instead of applying the local nature test manifest by the fact that all gas received into the Green System-East is consumed in Louisiana, the lower court would effectively write Section 1(c) out of the Act and return to the jurisdictional test of *East Ohio*. The Fifth Cir-

cuit would now hold that even where all gas is consumed within the state all interstate transportation and sales for resale are jurisdictional; only distribution companies would be exempt (App. at 21a). Under the lower court's interpretation, the corporate identity, not the physical operations, provides the touchstone of jurisdiction.

But the purpose of Section 1(c) was not limited to exemption of distribution companies. Such companies and their activities are already exempt under Section 1(b). Operation of companies, such as East Ohio Gas Company in Ohio, Columbia Gas of West Virginia, Inc. in West Virginia,[11] and Michigan Consolidated Gas Co. in Michigan[12] are statewide in nature. Their pipeline systems are more extensive than the Green System-East. Yet, the Hinshaw Amendment assures that their operations are subject to state regulation, since their operations are local in nature. Thus, it can readily be seen that contrary to the Fifth Circuit, Section 1(c) does include "local branches" of interstate pipelines. Indeed, the very characterization of the Green System-East as a "local branch" carries with it the implicit recognition that its operations are local in nature.

2. The Fifth Circuit's Decision is Contrary to Long-Standing Interpretation of Section 1(c).

In the years since adoption of Section 1(c), the Commission has, until this proceeding, consistently recognized the limitation of its power. It has issued more than 180 orders declaring exemptions under Section 1(c). Some of these have involved instances where a pipeline has exempted that portion of its facilities operated entirely within one state where all gas is consumed in that state even though no separate, artificial, corporate entity has

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[11] Columbia Gas of West Virginia, Inc., 44 F.P.C. 1260 (1970).

[12] Michigan Consolidated Gas Co., 46 F.P.C. 658 (1971).

been set up to conduct the exempt operations.[13] In other instances, such as *Pennzoil Pipeline Co.*, 44 F.P.C. 291 (1970), the Commission declared a Texas portion of United's interstate system to be exempt under Section 1(c) where all the gas received into the Pennzoil Pipeline is consumed in Texas.

The Fifth Circuit's decision, if allowed to stand, would emasculate the Section 1(c) exemption. The effect of its decision would reach far beyond the confines of this proceeding and would require re-examination of numerous exempt operations throughout the nation. What Congress has declared to be local in nature would not, if the lower court were correct, be local depending upon the identity of the party supplying the interstate gas. Clearly, as this Court noted in the *Panhandle Eastern* case (332 U.S. at 519):

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of the wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption."

The Court's language is directly in point here, but there can be no doubt that the result of the Fifth Circuit's decision would be "to cut down regulatory power [of the states] and to do so in a manner making states less capable of regulation than before the statute's [Section 1(c)] adoption."

Section 1(c) does not require that a state's exercise of jurisdiction be precisely the same as that expressed in the Act in order for the exemption to apply. Proce-

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[13] *See, e.g.*, Utah Gas Service Co., 38 F.P.C. 1210 (1967), *reh. denied*, 39 F.P.C. 388 (1968); Mountain Gas Co., 42 F.P.C. 305 (1969).

dures for state regulation were left to the states. Moreover, it is clear that no regulatory gap is created where the state regulates the transportation and sales for resale which, in the absence of Section 1(c), would be subject to federal regulation.[14]

As a practical matter, it may be noted that the applicability of Commission policy in such matters as curtailment can be applied on a uniform basis by retaining the dichotomy between federal and state jurisdiction expressed in the Section 1(c) exemption. Thus, the Commission may continue to regulate United in a uniform manner assuring, through established procedures, that the Green System-East, like all other non-jurisdictional systems or purchasers bears its fair share of curtailment. Commission curtailment procedures are designed on an end-use basis so that customers on the exempted Green System-East can share equally any allocation of supply on United's system with other consumers who rely upon United for gas supplies.

Pursuant to the Commission's curtailment policy, customers of a pipeline are curtailed on the basis of the end-use to which the gas is put by the ultimate consumers. Thus, a distribution company receives its allocation based upon the cumulative priorities of its customers. Significantly, however, the Commission expressly recognizes that once it has made its allocation, the actual

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[14] No regulatory gap is involved in this case since both the transportation and the sales for resale on the Green System-East are subject to regulation by the State of Louisiana. *See* La. Const. Art. 6, § 4, and 45 La. Rev. Stat. §§ 301-03. The fact that direct sales are not regulated in Louisiana is, of course, irrelevant to construction of Section 1(c). Direct sales are exempt from Commission regulation under Section 1(b) regardless of the nature of state regulation. Section 1(c) cannot be read to impose a requirement, not contained in Section 1(b), that state regulation must be broadened to cover direct sales.

allotment to customers on the distribution system is a matter for determination by the state commission.[15]

In the same manner, the Commission's curtailment policy is applicable to Hinshaw companies exempt under Section 1(c), *e.g.*, Pacific Lighting Gas Supply Company (which receives gas from El Paso Natural Gas Company and Transwestern Pipeline Company) and Pennzoil Pipeline Company (which receives gas from United).

CONCLUSION

For the reasons stated, a writ of ceritorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted

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[15] Panhandle Eastern Pipe Line Co., Docket No. RP71-119, (September 28, 1973) and Panhandle Eastern Pipe Line Co. (Pioneer-Hi-Bred Corn Co.), Docket No. RP71-119, (November 21, 1973).